STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 19, 2005
v	No. 250977 Ogemaw Circuit Court
JONATHON CARL SCHEIDLER, Defendant-Appellee.	LC No. 02-002091-FH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Jonathon Carl Scheidler of five counts of child sexually abusive activity.[1] The trial court sentenced defendant to five concurrent terms of seven to forty years in prison. Defendant appeals his convictions and sentences, and we affirm.

I. Impartiality of the Jury

Defendant argues that he was prejudiced because two jurors had previous negative experiences with defendant's associate, Jason Kruger, who was one of the adult men filmed in the child sexually abusive materials.[2] This issue is governed by the rule articulated in *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), which states:

> [W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.

(a) Prejudice

[1] MCL 750.145c(2).

[2] Defendant preserved this issue by raising it in his motion for a new trial. A trial court's decision on a claim of improper presence of jurors on the panel is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003).

Here, there was no prejudice. Kruger's role in the case was relatively minor and was irrelevant to a determination of defendant's guilt or innocence. The fact that Kruger appears in the films is totally irrelevant to the pivotal factual questions presented to the jury. The jury's job was to decide if defendant (1) filmed a taped sequence (in which Kruger was not shown), and (2) knew that the girls he filmed were under age eighteen. Neither Kruger's presence nor absence in any filming had any bearing on the jury's determination of defendant's guilt. It is true that a character witness mentioned Kruger as someone who was familiar with defendant's good character. However, this second-hand reference is far too tangential to form the basis for a finding of prejudice, as is the brief reference to Kruger in the prosecutor's closing argument.

One of the jurors knew Kruger because the juror was Kruger's middle school principal. This juror stated that he could be fair notwithstanding Kruger's involvement, and there is no reason to doubt this statement. Kruger's mother has supplied defendant with an affidavit, stating that there were serious discipline issues between the juror and Kruger when Kruger was in middle school. However, in light of the juror's statement that he could be fair, this does not provide a basis for finding either that he was prejudiced against defendant.

The relationship between Kruger and the other juror was of a much more serious matter, and were it not for the nature of Kruger's minor role in defendant's case, we would view this as a closer question. This juror, who once had a romantic relationship with Kruger, also says that Kruger raped her when they were in middle school, though Kruger was never charged with a crime. In her affidavits, the juror says that she continues to be afraid of Kruger, and would avoid even the slightest casual contact with him. However, she also said that she could be fair notwithstanding Kruger's involvement in the case. In her affidavits, she states that she would not have said this had she known Kruger was involved in the case in the way he was, and that she cannot say how she would have voted had Kruger not been involved. However, as already noted, Kruger's role in the case was minor and had no real bearing on the issues relating to defendant's guilt or innocence. Therefore, we find that defendant was not prejudiced by this juror's membership on the panel.

(b) Cause

It is "the duty of counsel to ferret out potential bases for excusing jurors." *Bynum v The ESAB Group, Inc*, 467 Mich 280, 284; 651 NW2d 383 (2002), citing *People v Scott*, 56 Mich 154; 22 NW 274 (1885). Here, both jurors truthfully disclosed that they knew Kruger during voir dire. Defense counsel could have, but did not, ask more questions of both jurors to further explore the nature of the jurors' relationships with Kruger. Because defense counsel chose not to inquire further of the jurors during voir dire despite their revelation that both knew Kruger, defendant cannot now claim error on the basis that information that may have been the basis for a challenge for cause did not come to light until after trial. See *People v Johnson*, 245 Mich App 243, 250-255; 631 NW2d 1 (2001) (O'Connell, P.J., plurality opinion); see also *People v Johnson*, 467 Mich 925, 926-928; 654 NW2d 321 (2002) (Corrigan, C.J., concurring in the

Supreme Court's order to deny leave to appeal this Court's opinion in *Johnson, supra*, 245 Mich App 243).[3]

Therefore, we hold that the trial court did not abuse its discretion in denying the motion for a new trial because of the juror's presence on the jury, and the facts which came to light after trial.

II. Effective Assistance of Counsel

Defendant contends that this case must be remanded for a *Ginther*[4] hearing to determine whether trial counsel was ineffective because he failed to further explore the relationships between these jurors and Kruger, when doing so would have resulted in successful challenges to their presence on the jury.

Ineffective assistance is found only where counsel's performance falls below an objective standard of reasonableness, and where the ineffective assistance was so prejudicial to the defendant that there is a reasonable probability that without the ineffective assistance, the outcome would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 311, 314, 326; 521 NW2d 797 (1994).

Because there was no serious prejudice to defendant from the presence of the two jurors, their exclusion would not have changed the outcome of the trial. Moreover, based on what was said during voir dire, there was no reason to suspect a problem with the two jurors. Only through some extraordinary intuition could defense counsel have suspected, based on what was said, that either juror had a prior acrimonious relationship with Kruger. Accordingly, we hold that defendant cannot establish that he was deprived of the effective assistance of trial counsel.[5]

III Constitutional Claims

Defendant maintains, incorrectly, that the child sexually abusive materials statute places overly broad limitations on the constitutional right to sexual privacy and on his right to freedom of speech under the First Amendment.[6] Because defendant did not preserve this constitutional

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[3] Neither this Court's plurality opinion in *Johnson* nor Chief Justice Corrigan's concurrence with the Supreme Court's decision to deny leave to appeal this Court's decision in that case are binding upon this Court. See *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998); *People v Bender*, 208 Mich App 221, 229; 527 NW2d 66 (1994), aff'd 452 Mich 594; 551 NW2d 71 (1996). We nonetheless find both opinions to be persuasive.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] Appellate counsel for defendant states that, although he has done his best to bring the crucial issues before this Court, he cannot prevail on them without a remand for an evidentiary hearing. Therefore, he reasons, this Court's decision not to remand this case has rendered him ineffective, thereby depriving defendant of the effective appellate counsel to which he is entitled. This argument simply lacks merit, and we reject it.

[6] US Const, Am I.

issue, our review is limited to whether he has shown a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A state may legitimately criminalize child pornography. See e.g., *Osborne v Ohio*, 495 US 103, 109-110; 110 S Ct 1691; 109 L Ed 2d 98 (1990); *People v Riggs*, 237 Mich App 584, 595; 604 NW2d 68 (1999); *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). Defendant asserts, erroneously, that the statute goes beyond criminalizing child pornography, and also criminalizes behavior that is constitutionally protected, and therefore must be struck down.

Defendant argues that sixteen-year-olds may legally engage in sexual activities. This assertion, of course, misses the point of the statutory prohibition.

Defendant's right to sexual privacy is not implicated here. Defendant's convictions are not premised upon private sexual activity of defendant or others, but rather on the inducement of child sexually abusive activity for the purpose of filming that activity. Thus, defendant's convictions have nothing to do with his or others' privacy.

We also reject defendant's contention that the statute violated his right to free speech. Defendant knowingly induced or allowed children to perform sex acts, and filmed those acts. Because a state can properly prohibit the production of child pornography to protect children from sexual exploitation, the statute does not implicate defendant's First Amendment right to free speech. Moreover, obscenity is not constitutionally protected. Obscenity is defined as a work which, taken as a whole, (1) appeals to a prurient interest in sex, (2) portrays sexual conduct in a patently offensive way, and (3) lacks serious literary, artistic, political or scientific value. *Miller v California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973). The videotape which defendant was charged with making was obscene, and therefore not constitutionally protected. It depicts two things: teenaged girls exposing their breasts and genital areas, having intercourse and oral sex with adult males, and being sexually fondled by the men. These depictions appeal to prurient interest, nothing more. The videotape does not meet the *Miller* standard for inclusion of serious content. Therefore, we hold that the First Amendment neither applies to nor protects this criminal conduct.

IV. Double Jeopardy

Defendant claims that his Fifth Amendment[7] right not to be placed twice in jeopardy for the same offense has been violated. This occurred, he argues, when he was convicted for three separate offenses stemming from filming a single sequence of three child sexually abusive activities involving the same young woman.

MCL 750.145c(2) provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing

[7] US Const, Am V.

> any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [MCL 750.145c(2).]

Child sexually abusive activity "means a child engaging in a listed sexual act." MCL 750.145c(1)(l). A listed sexual act "means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h).

Our Court in *People v Harmon*, 248 Mich App 522, 526-528; 640 NW2d 314 (2001), held that the defendant's conviction of four counts of child sexually abusive activity was appropriate because the prosecution introduced four photographs that each featured two fifteen-year-old girls engaged in "listed sexual acts." Here, defendant insists that because there was a single film sequence made of the victim in question, this Court's decision in *Harmon* compels the conclusion that defendant can properly be convicted of only one count. However, a fair reading of MCL 750.145c(2) reveals that this section is violated when a person (1) induces a child to engage in a prohibited sexual act for the purpose of producing child sexually abusive material; *or* (2) produces child sexually abusive material. The former offense does not contain as an element the actual production of child sexually abusive material, and the latter offense does not require proof that a person induced a child to engage in the acts depicted. Defendant here was charged with the former offense: inducing or knowingly allowing a child to engage in child sexually abusive activity for the purpose of producing child sexually abusive material. The number of materials produced, and, indeed, even *whether* any material was produced is irrelevant. What is relevant is that the victim in question engaged in three different "listed sexual acts," and that defendant either induced or knowingly allowed her to do so while filming the proscribed conduct. The fact that these three acts appear on the same video is irrelevant for the purposes of the crime for which defendant was convicted. What is relevant is the number of acts performed. Because the same victim performed three different "listed sexual acts," we hold that defendant was properly convicted of three different counts.

V. Defendant's Notice of the Charges Against Him

Defendant says that his Fifth Amendment due process rights were violated because he did not receive proper notice of the charges against him.[8]

[8] The denial of the motion for a new trial itself is reviewed for abuse of discretion, with any factual findings reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court's authorization of an amendment to the information is also reviewed for (continued…)

Though there was some initial confusion regarding whether defendant was charged with videotaping the oldest of the victims with Josh Bohannan or with Jake Kruger, this discrepancy was cleared up before the defense began to put on its case. Moreover, because defendant acknowledged filming the sequence in question, and because his defenses focused on whether he had reason to know the victims were under eighteen years of age, the initial confusion had no effect on the defense. We hold that there was no unfair surprise or prejudice, and hence no ground for reversal.[9]

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski

(…continued)

clear error and the focus is "unfair surprise or prejudice" to defendant. MCR 6.112(H); *People v McGee*, 258 Mich App 683, 687; 672 NW2d 191 (2003).

[9] Defendant also says that there was insufficient evidence to sustain the verdicts of guilty on Counts 2 and 3, and that these verdicts were against the great weight of the evidence. Because there is overwhelming evidence of defendant's guilt on both counts, we reject this claim as frivolous.